MULTISTATE TAX COMMISSION
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To: Robynn Wilson, Chair
Members of MTC Income & Franchise Tax Uniformity Subcommittee
From: Shirley Sicilian, General Counsel
Date: July 14, 2011
Subject: Model Compact Art. IV.1(g) Amendments

I. Background.

At its July, 2009 meeting, the Executive Committee directed that "revisions to Article IV of the Compact - specifically, the five areas suggested as the focus for ULC's revision project - be referred to the Uniformity Committee and that [the Uniformity Committee] come back to the Executive Committee if the Uniformity Committee recommends the scope of issues be changed." The five areas are:

1. Sales factor numerator sourcing for transactions other than sales of tangible personal property – Art.IV.17
2. Definition of Sales – Art.IV.1(g)
3. Definition of Business Income – Art.IV.1(a)
4. Factor Weighting – Art. IV.9
5. Distortion Relief Provision - Art.IV.18

The Uniformity Subcommittee started with revisions for item 1, sales factor numerator sourcing for receipts from all transactions other than sales of tangible personal property under §17. This includes receipts from lease of TPP, sale/lease of real property, sale of services, and sale/license of intangibles. The Subcommittee recognized there is overlap between efforts to revise the definition of "sales" under §1(g) and to revise the sourcing for those sales under §17. If the sales are not included in the new definition, then they don't need to be sourced. So, before finalizing its work on §17, the Subcommittee has turned its attention to §1(g). The Subcommittee has also recognized overlapping issues between the definition of "sales" and factor weighting.

At its June, 2011 teleconference, the subcommittee reviewed draft amendments to the definition of "sales." These drafts reflected the Subcommittee's preliminary policy choices to clarify in the Compact that "sales" (1) includes only gross receipts associated with the transactional test (the "narrow approach" discussed in the policy checklist attached) and (2) excludes treasury function and other financing type receipts. Both choices are consistent with the current structure of the existing Compact and model regulations. After review, the Subcommittee requested additional information to be added to the policy checklist.

The Subcommittee's goal is to finalize its proposed revisions for §17 (sales numerator sourcing for services and intangibles) and for §1(g) (definition of sales) at its July, 2011 meetings. If that goal is met, then the next step will be for the Uniformity Committee to consider whether to recommend proceeding to public hearing on these two provisions or waiting until proposed revisions are ready for the entire UDITPA-related package.

The materials included in Section II of this memorandum include: an expanded policy issue list (p. 2), a draft narrow version of the model (p. 12)[1], and building blocks for considering alternative models (p.13).

II. Materials

Policy Issue List

1. What activity does the "sales factor" currently reflect?

A. Compact – "all gross receipts of the taxpayer not allocated…" The Compact currently defines "sales" broadly as "all gross receipts of the taxpayer not allocated under paragraphs of this Article." (Art.IV(1)(g)) Thus, the definition of "sales" appears to include gross receipts associated with apportionable, business income. Under the Compact, apportionable "business income" is income that meets either the transactional test or the functional test: "income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." (Art.IV(1)(a)) Gross receipts associated with the transactional test could include, for example, receipts from the sale, lease, or license of the taxpayer's product – goods or services – to its customers. Gross receipts associated with the functional test could include receipts from the sale or lease of non-inventory, business assets that are or were used in the operation of the taxpayer's unitary business to produce or provide the product that it sells to its customers.

B. Regulations – reference transactional, but not functional, test; exclude, or otherwise limit, treasury function and other financing receipts.

i. Transactional test. MTC model regulations specify "the term 'sales' means all gross receipts derived by the taxpayer from transactions and activity in the regular course of the trade or business**."** (Reg. IV.15.(a). Sales Factor: In General.) This clause – "transactions and activity in the regular course of the trade or business" – mirrors the Compact language for the first of the two tests for business income, the transactional test. The second, functional test – "income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations" – is not referenced. The model regulations also specifically exclude certain types of receipts generally associated with the functional test as distortive, even though these might already be excluded if receipts are limited to transactional-test receipts (Reg.IV.18(c)):

a. "substantial amounts of gross receipts from *an incidental or occasional sale* of a fixed asset used in the regular course of the taxpayer's trade or business, for example, gross receipts from the sale of a factory or plant;

[1] The drafting group includes Ben Miller and Mellissa Potter, CA-FTB; Ted Spangler, ID; Michael Fatale, MA; Gary Humphrey and Janielle Lipscomb, OR; Joe Garrett, AL

b. "insubstantial amounts of gross receipts arising *from incidental or occasional transactions or activities* unless their exclusion would materially affect the amount of income apportioned to this state, for example, the sale of office furniture, business automobiles, etc.." (emphasis added).

ii. **Treasury function - excluded or limited.** Other more recent regulations further limit the definition of gross receipts by listing specific types of receipts from treasury function transactions and other financial activity that is excluded, even though income associated with this activity could arguably meet the transactional test and would be included in apportionable income (MTC Reg. IV(2)(a)):

a. repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;

b. the principal amount received under a repurchase agreement or other transaction properly characterized as a loan;

c. proceeds from issuance of the taxpayer's own stock or from sale of treasury stock;

Current MTC regulations further specify that, where receipts from treasury function transactions are not excluded from the sales factor by other provisions, only the overall net gain from those transactions (for each treasury function for the tax period) is included in the sales factor. (MTC Reg. IV.18(c)(4)(A))

2. What activity should the "sales factor" reflect?

A. Should the definition reference only the transactional test? Should the sales factor broadly include all receipts associated with business income or should it be more narrowly limited to transactional receipts? Transactional receipts would include, e.g., receipts from the sale of the taxpayer's product – goods or services – to its customers. Functional receipts would include, e.g., receipts from the sale of the taxpayer's used production assets – factory, equipment. At its March meeting, the Subcommittee chose the more narrow approach. But at its May teleconference, the subcommittee asked for the list of issues related to that choice, and to see an alternative that would reflect the broad approach.

i. **Rationale for narrow approach:** The role of the sales factor in the apportionment formula is to reflect the contribution of the market, or the demand side, to the earning of income. The property and payroll factors represent, respectively, the contribution of capital and labor or, collectively, the supply side. The factors themselves are not what is being taxed. Rather, they only reflect certain activities by which we will apportion the income that is to be taxed. As such, the items included in any factor do not need to broadly reflect all unitary activity, but need only reflect the activities the particular factor is designed to represent. It is therefore unnecessary, and in fact may be counter-productive, to include an item in the factor if it does not reflect that activity. In the case of the sales factor, only those items that represent the market for the taxpayer's product, its sales to its customers, should be included. Because the sales factor is intended to balance the property and payroll factors it should be defined to offset rather than amplify the effects of the property and payroll factors. But including receipts from the sale of assets used in the business could double count the property already included in the property factor. Because the purpose of the sales factor is to balance the other two factors, the use of those two elements to assign sales, costs of production from property and payroll, should be avoided.

If the narrow approach is maintained, then the drafting question is whether there is any need to move the regulatory limitation into the statute for clarity. For example:

Narrow Approach – A

1(g) "Sales" means ~~all gross receipts of the taxpayer not allocated under paragraphs of this Article~~ amounts that give rise to apportionable income and that are received by the taxpayer from transactions and activity in the regular course of its trade or business.

Or, Narrow Approach – B

1(g) "Sales" means ~~all~~ gross receipts of the taxpayer that are not allocated under paragraphs of this article, and that are received from transactions and activity in the regular course of the taxpayer's trade or business.

Note that several states have litigated the scope of "all gross receipts" with respect to the treasury function. In that litigation, approximately half of the courts concluded that treasury function receipts are "gross receipts" (though possibly distortive), while the other half found that they are not "gross receipts." Treasury function receipts can be specifically excluded in the statute (see part 2.B. of this policy list). But both versions A and B also address the breadth of the current language, in part, by modifying the term "all gross receipts." Version A substitutes an entirely new term, "amounts." This would have the benefit of getting away from those decisions that held "gross receipts" includes treasury receipts, on the one hand. But the new term "amounts" would have to be litigated, of course, and it's possible that "amounts" could just as well be held to encompass treasury receipts. Version B simply deletes "all" and retains the term "gross receipts." This approach does not definitively, by itself, exclude treasury function receipts. But it does have the benefit that it is an established term and would not requiring re-litigation of "gross receipts" for various issues that have been litigated in the past.

ii. Rationale for Broad approach: Responsive to claim that: If a net receipt is included in the pool of income to be apportioned, the corresponding gross receipt should be included in the sales factor used to apportion it. Also, omitting receipts from a large asset sale could result in distortion to the extent the state does not include a property factor in its apportionment formula. For example, if taxpayer made a large gain on the sale of production assets located in a single sales factor state where it had made relatively few sales, and if that gain made up a significant part of the taxpayer's apportionable income, then the State's single sales factor apportionment formula may produce a mismatch between where the apportionable income arose and where it's being apportioned. Including these types of receipts in the sales factor, and sourcing them to the location of the asset that produced the receipt, could alleviate this mismatch. Even states that do have a property factor could experience distortion if the sale took place early in the year (so that the property that produced the gain is not fully included in the property factor). If these situations occur and create distortion on a regular basis, then *ad hoc* relief under section 18 may not be the most efficient remedy. Rather, the notion of "market" could be expanded to include the market for *any* things that the taxpayer sells, including things sold to persons other than its customers. e.g., production assets that were once used in the taxpayer's business operations to produce the product that it sold to its customers. Although this approach could potentially double count property already included in the state's property factor, in separate entity taxing states or states with single sales factor apportionment, there might not be double counting, and the inclusion might help to approximate an equitable result.

If the broad approach is chosen, then the Compact language may be fine as is. But the regulatory limitation should be deleted and the regulations reworked. So the Compact definition would continue to read:

> 1(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article

iii. An intermediate approach? Possibilities include one or more of the following:

a. **Include receipts generally – transactional and functional – but include functional receipts at net rather than gross.** The "sales" included through the functional test could be limited to net receipts, or gain on the sale. This may alleviate potential double counting of the property factor, since property is generally included in the property factor at original cost. It might also help prevent distortion that could occur when including functional test receipts, since the gross receipts from such sales may be large, while net income to be apportioned from such sales may be small or even negative.

b. **Exclude functional receipts generally, except for specific types that can be reasonably sourced.** For example, the definition could include all transactional receipts and those functional receipts that arise from:
   - sale or lease of real estate or tangible personal property.
   - sale or lease of intangible property that represents ownership or the right to use real estate or tangible personal property (e.g., stock sales where the receipts can be attributed to location of underlying tangible assets. Goodwill would be excluded under a theory that it is attributable to the location of the market, or to the market and the tangible assets, rather than merely to the tangible assets. See e.g., Massachusetts statute excluding the sale of the business "good will" or similar intangible value, including, without limitation, "going concern value" and "workforce in place.)
   - gain from sale, exchange or other disposition of a capital asset used in a taxpayer's trade or business, including a deemed sale or exchange of such asset (See, e.g., Massachusetts statute)
   - sale, lease, or license of a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area.
   - interest income received on deferred payments on sales of tangible property (MTC Reg. IV.15.(a)(1)(A)) and income from the sale, licensing or other use of intangible personal property (MTC Reg. IV.17.(2)(D)) (MTC Reg. IV.18(c)(3))

c. Include all gross receipts generally – both transactional and functional - except for specific types that cannot be reasonably sourced or are not reflective of a "sale." For example, the definition could include all gross receipts, except those related to:

- dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures or government securities that results from the mere holding of the intangible personal property by the taxpayer (MTC Reg. IV.18(c)(3); see also Massachusetts statute excluding interest, dividends, and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities)
- damages and other amounts received as the result of litigation; (MTC Reg. IV.2.(a))
- property acquired by an agent on behalf of another(MTC Reg. IV.2.(a));
- tax refunds and other tax benefit recoveries(MTC Reg. IV.2.(a));
- pension reversions(MTC Reg. IV.2.(a));
- contributions to capital (except for sales of securities by securities dealers) (MTC Reg. IV.2.(a));
- income from forgiveness of indebtedness(MTC Reg. IV.2.(a));
- amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code(MTC Reg. IV.2.(a))
- the sale of the business "good will" or similar intangible value, including, without limitation, "going concern value" and "workforce in place (Massachusetts statute)

d. If an intermediate approach is chosen, then amendments would certainly be needed. An example of one intermediate approach would be:

1(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article, except that (1) receipts from the sale, exchange, deemed sale or exchange, or other disposition of a capital asset used in a taxpayer's trade or business shall be limited to the overall gain from such transaction, and (2) receipts from the sale, exchange, or other disposition of intangible property; other than exchange for a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area; shall be excluded.

Or,

1(g) "Sales" means ~~all~~:

(1) gross receipts of the taxpayer ~~not allocated under paragraphs of this article,~~ from transactions and activity in the regular course of the taxpayer's trade or business, and

(2) net receipts of the taxpayer from the sale, lease, exchange, deemed sale or exchange, or other disposition of a capital asset used in a taxpayer's trade or business that is:

(a) real property,

(b) tangible personal property, or

(c) a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area.

B. Treasury Function. Does the Compact need to be amended to either entirely exclude or limit treasury function receipts that are included in "sales"? It is this issue that prompted the Executive Committee to request Uniformity Committee review of the "sales" definition.

i. Current Compact and regulations. The Compact defines "sales" as "all gross receipts of the taxpayer…." But the term "gross receipts" is not defined. Many states have confronted the question of whether the term "gross receipts" includes return of investment principal in the case of the repayment of a loan or a short-term investment of working capital. The MTC has promulgated two model regulations on this point. One interprets the existing language to exclude returns of taxpayer's principal in most cases. The other limits any treasury function receipts that are not excluded to net rather than gross.

ii. Exclude entirely or limit inclusion to net receipts?

a. Policy Issues. Treasury function receipts may be associated with apportionable unitary income. Further, Taxpayer's purpose in earning receipts from financial transactions (earn a return) is no different than purpose in earning receipts from all other transactions. So why treat differently from other receipts? If the reason is distortion, then perhaps the receipts should be included at net rather than gross. If the reason is inability to source properly, then perhaps the receipts should be excluded altogether. (see research provided by Charles McLure: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Committee_and_Subcommittees/09_Winter_Committee_Meeting/McLure-Definition%20of%20Gross%20Receipts.pdf)

b. Litigation. Several states have litigated the scope of "all gross receipts" with respect to the treasury function. In that litigation, approximately half of the courts concluded that treasury function receipts are not "gross receipts" and are thus are excluded entirely.[2] The other half found that treasury function receipts are "gross receipts" but could be excluded entirely or limited to "net" receipts in order to prevent distortion.[3]

iii. Drafting Options. Assuming the Uniformity Committee continues to believe that treasury function receipts should be limited or excluded from the definition of sales, is it enough that they are limited excluded by regulation or does the Compact need to be amended to make the limitation or exclusion by statute? If by statute, there are at least three drafting methods for accomplishing this – a general statement, a list, or a combination of general statement and list.

a. Statement of the general rule. The elimination of treasury and other financial type activities could be made clearer by stating the types of transactions that are excluded. For example:

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[2] E.g., *AT&T v. Director, New* Jersey, NJ Superior Ct. (1978); *Sherwin Williams v.* Indiana, IN Tax Ct., (1996); *Walgreen v. AZ* DOR; Ariz. Ct. of App. (2004).

[3] E.g. *Microsoft v. CA FTB*, Cal. Sup. Ct. (2006); *AT&T v. Director*, NJ Superior Ct., (1978); *Sherwin Williams v. Johnson* , Tenn. Ct. of App. (1998).

Broad approach: 1(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article, except that receipts from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities shall be ["excluded" or "limited to the overall net gain from such transaction or activity for the tax period."].

Narrow approach. 1(g) "Sales" means amounts that give rise to apportionable income and that are received by the taxpayer from its customer for transactions and activity in the regular course of its trade or business, except that amounts from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities shall be ["excluded "or "limited to the overall net gain from such transaction or activity for the tax period"].

In addition, the term "customer" could be defined by regulation. For example, "customer" could be defined based on current MTC regulations defining transactional test to mean:

> Customer means a person who purchases, leases or licenses (1) inventory or services which are commonly sold, leased, or licensed by the taxpayer in the regular course of the taxpayer's trade or business, or (2) property used in the taxpayer's production of business income of a kind that is sold, leased, or licensed, and replaced with some regularity, even if replaced less frequently than once a year. "Customer" does not include a person who engages with the taxpayer in the taxpayer's investment activities, such as activities that are for the taxpayer's mere financial betterment rather than for the operations of the trade or business, even if such activities are conducted frequently by the taxpayer. [OPTIONAL: "Customer" does not include a person whose unitary income is included with the taxpayer's unitary income in the calculation of the total unitary income subject to apportionment.]

b. A specific list. As an alternative, a specific list of excluded transactions, currently in regulation, could be added to the Compact definition. It would be important to specify whether this is a comprehensive list or a list of examples.. If examples only, then in theory a state could argue that a transaction that is not specifically referenced should be excluded because it is analogous to an item that is listed -- but inclusion of a general rule would help support that theory and guide the analogy. For example:

Broad approach: 1(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article, but does not include:

1. repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;
2. the principal amount received under a repurchase agreement or other transaction properly characterized as a loan;
3. proceeds from issuance of the taxpayer's own stock or from sale of treasury stock;

4. receipts from hedging transactions involving intangible assets, including options contracts to hedge foreign currency;
5. Receipts related to transactions involving liquid assets held in connection with one or more treasury function of the taxpayer (included in MTC reg, but only at net)
6. interest, dividends, and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities.

Narrow Approach: 1(g) "Sales" means amounts that give rise to apportionable income and that are received by the taxpayer from transactions and activity in the regular course of its trade or business, but does not include:

1. repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;
2. the principal amount received under a repurchase agreement or other transaction properly characterized as a loan;
3. proceeds from issuance of the taxpayer's own stock or from sale of treasury stock;
4. receipts from hedging transactions involving intangible assets, including options contracts to hedge foreign currency;
5. Receipts related to transactions involving liquid assets held in connection with one or more treasury function of the taxpayer (included in MTC reg, but only at net)
6. interest, dividends, and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities.

c. **Statement of the general rule, plus a specific list of excluded items.** For example:

Broad approach: 1(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article; except that receipts from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, including but not limited to the following transactions, shall be ["excluded" or "limited to the overall net gain from such transaction or activity for the tax period."]:

1. repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;
2. the principal amount received under a repurchase agreement or other transaction properly characterized as a loan;
3. proceeds from issuance of the taxpayer's own stock or from sale of treasury stock;
4. receipts from hedging transactions involving intangible assets, including options contracts to hedge foreign currency;
5. Receipts related to transactions involving liquid assets held in connection with one or more treasury function of the taxpayer (included in MTC reg, but only at net)
6. interest, dividends, and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities.

Narrow Approach: 1(g) "Sales" means amounts that give rise to apportionable income and that are received by the taxpayer from its customer for transactions and activity in the regular course of its trade or business, except that amounts from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities shall be ["excluded" or "limited to the overall net gain from such transaction or activity for the tax period."]..

Regulation: "customer" means a person who purchases, leases or licenses (1) inventory or services which are commonly sold, leased, or licensed by the taxpayer in the regular course of the taxpayer's trade or business, or (2) property used in the taxpayer's production of business income of a kind that is sold, leased, or licensed, and replaced with some regularity, even if replaced less frequently than once a year. "Customer" does not include a person who engages with the taxpayer in the taxpayer's investment activities, such as activities that are for the taxpayer's mere financial betterment rather than for the operations of the trade or business, even if such activities are conducted frequently by the taxpayer. [OPTIONAL: "Customer" does not include a person whose unitary income is included with the taxpayer's unitary income in the calculation of the total unitary income subject to apportionment.] Examples of investment activities that are for the taxpayer's mere financial benefit or are otherwise are not engaged in with a customer are:

1. repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;
2. the principal amount received under a repurchase agreement or other transaction properly characterized as a loan;
3. proceeds from issuance of the taxpayer's own stock or from sale of treasury stock;
4. damages and other amounts received as the result of litigation;
5. property acquired by an agent on behalf of another;
6. tax refunds and other tax benefit recoveries;
7. pension reversions;
8. contributions to capital (except for sales of securities by securities dealers);
9. income from forgiveness of indebtedness;
10. amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code;
11. receipts from hedging transactions involving intangible assets, including options contracts to hedge foreign currency.
12. insurance proceeds
13. substantial amounts of gross receipts from an incidental or occasional sale of a fixed asset used in the regular course of the taxpayer's trade or business, for example, gross receipts from the sale of a factory or plant;
14. insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities unless their exclusion would materially affect the amount of income apportioned to this state, for example, the sale of office furniture, business automobiles, etc.; or

15. business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures or government securities results from the mere holding of the intangible personal property by the taxpayer.
16. Receipts related to transactions involving liquid assets held in connection with one or more treasury function of the taxpayer (included, but only at net)
17. interest, dividends, and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities.
18. receipts from the sale of the business "good will" or similar intangible value, including, without limitation, "going concern value" and "workforce in place."

Sample Draft - Narrow Approach B, Excluding Treasury Function

Compact:

1(g) “Sales” means gross receipts of [or “amounts received from” see 2.A.i., p.3] the taxpayer that are not allocated under paragraphs of this article, and that are received [from its customer] for transactions and activity in the regular course of the taxpayer’s trade or business; except that amounts from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities shall be exclude [or “limited to the overall net gain from such transaction or activity for the tax period.” See 2.B.ii., p.6].

Regulation:

[If the term “Customer” is used in the statute] “Customer means a person who purchases, leases or licenses (1) inventory or services which are commonly sold, leased, or licensed by the taxpayer in the regular course of the taxpayer’s trade or business, or (2) property used in the taxpayer’s production of business income of a kind that is sold, leased, or licensed, and replaced with some regularity, even if replaced less frequently than once a year. “Customer” does not include a person who engages with the taxpayer in the taxpayer’s investment activities, such as activities that are for the taxpayer’s mere financial betterment rather than for the operations of the trade or business, even if such activities are conducted frequently by the taxpayer. Examples of activities that are for the taxpayer’s financial benefit or do not otherwise involve customer are:

1. repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;
2. the principal amount received under a repurchase agreement or other transaction properly characterized as a loan;
3. proceeds from issuance of the taxpayer’s own stock or from sale of treasury stock;
4. damages and other amounts received as the result of litigation;
5. property acquired by an agent on behalf of another;
6. tax refunds and other tax benefit recoveries;
7. pension reversions;
8. contributions to capital (except for sales of securities by securities dealers);
9. income from forgiveness of indebtedness;
10. amounts realized from exchanges of inventory that are not recognized by the IRC;
11. receipts from hedging transactions involving intangible assets, including options contracts to hedge foreign currency.
12. insurance proceeds
13. substantial amounts of gross receipts from an incidental or occasional sale of a fixed asset used in the regular course of the taxpayer's trade or business, for example, gross receipts from the sale of a factory or plant;
14. insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities unless their exclusion would materially affect the amount of income apportioned to this state, for example, the sale of office furniture, business automobiles, etc.; or
15. business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures or government securities results from the mere holding of the intangible personal property by the taxpayer.
16. Receipts related to transactions involving liquid assets held in connection with one or more treasury function of the taxpayer (included, but only at net)
17. interest, dividends, and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities.
18. receipts from the sale of the business "good will" or similar intangible value, including, without limitation, "going concern value" and "workforce in place."

Alternative Basic Rules

Broad Approach – Current Rule

1(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this Article, except that amounts from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities shall be ["excluded" or "limited to the overall net gain from such transaction or activity for the tax period."]

Narrow Approach – A

1(g) "Sales" means ~~all gross receipts of the taxpayer not allocated under paragraphs of this Article~~ amounts that give rise to apportionable income and that are received by the taxpayer from its customers for transactions and activity in the regular course of its trade or business, except that amounts from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities shall be ["excluded" or "limited to the overall net gain from such transaction or activity for the tax period."].

Narrow Approach – B

1(g) "Sales" means ~~all~~ gross receipts of the taxpayer that are not allocated under paragraphs of this article, and that are received from its customers for transactions and activity in the regular course of the taxpayer's trade or business, except that amounts from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities shall be ["excluded" or "limited to the overall net gain from such transaction or activity for the tax period."].

Consider Adding/Subtracting Receipts from Specific Transaction Types

Add to Narrow Rule?

- any sale, lease, or license of taxpayer's real, tangible personal, or intangible property used in its trade or business. (e.g., equipment machinery, plant, contract rights, or other assets used in production of taxpayers product.)
  - **i.** Exceptions?
    - **a.** incidental or occasional sales (currently excluded by MTC Reg. IV.18(c)(1) if substantial) or
    - **b.** the sale of the business "good will" or similar intangible value, including, without limitation, "going concern value" and "workforce in place (See, e.g., exclusion by Massachusetts statute)
    - **c.** sale or lease of surplus assets
  - **ii.** More limited addition?
    - **a.** Limit the above to net receipts (gain) from such transactions (see e.g. Massachusetts statute which adopts the broad approach, but limits receipts from "the sale, exchange, or other disposition of a capital asset … used in a taxpayer's trade or business, including a deemed sale or exchange of such asset" to the gain on such transaction.
  - **iii.** Limit addition of intangible property transactions?
    - **a.** limit the inclusion of receipts from sale, lease, or license of intangible property to intangible property that represents ownership or the right to use real estate or tangible personal property (e.g., stock sales where the receipts can be attributed to location of underlying tangible assets, except that goodwill would continue to be excluded under a theory that it is attributable to the location of the market, or to the market and the tangible assets, rather than merely to the tangible assets. See

e.g., Massachusetts statute excluding the sale of the business “good will” or similar intangible value, including, without limitation, “going concern value” and “workforce in place.”)

b. limit the inclusion of receipts from sale, lease, or license of intangible property to receipts from transactions involving contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area (See, e.g., MA statute)

- include interest income received on deferred payments on sales of tangible property? (currently included by MTC Reg. IV.15.(a)(1)(A)

Subtract from Broad rule?

- receipts that result from the holding of intangible personal property by the taxpayer (currently excluded by MTC Reg. IV.18(c)(3) but limited to “mere” holding; see also Massachusetts statute excluding interest, dividends, and gross receipts from the maturity, redemption, sale, exchange or other disposition of securities)
  i. dividends received on stock,
  ii. royalties received on patents or copyrights,
  iii. interest received on bonds, debentures or government securities
- damages and other amounts received as the result of litigation; (currently excluded by MTC Reg. IV.2.(a))
- Insurance Proceeds
- property acquired by an agent on behalf of another (currently excluded by MTC Reg. IV.2.(a))
- tax refunds and other tax benefit recoveries (currently excluded by MTC Reg. IV.2.(a));
- pension reversions (currently excluded by MTC Reg. IV.2.(a));
- income from forgiveness of indebtedness (currently excluded by MTC Reg. IV.2.(a));
- amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code (currently excluded by MTC Reg. IV.2.(a))
- contributions to capital, e.g., proceeds from the issuance of taxpayer’s stock or securities , or sales of treasury stock (except for sales of securities by securities dealers) (currently excluded by MTC Reg. IV.2.(a));
- any treasury function receipts (security dealers excepted)
- Hedging transactions (See, e.g., California regulations)